Public Prosecutor v Khairil Anwar bin Abdul Rahim

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(H)-304–11 OF 2015
TENGKU MAIMUN, AHMADI ASNAWI AND HARMINDAR SINGH JJCA
28 APRIL 2016

Criminal Procedure — Sentencing — Drug possession — Respondent charged and sentenced for possession of drugs — Appellant dissatisfied with sentence and appealed against sentence — Whether discount ought to be given on account of guilty plea — Whether there were strong aggravating factors against respondent — Whether sentence passed adequate — Dangerous Drugs Act 1952 ss 6 & 39A(2)

This was an appeal against the inadequacy of sentence passed by the High Court on the respondent for an alternative charge under s 6 of the Dangerous Drugs Act 1952 ('the DDA') punishable under s 39A(2) of the same. On 27 February 2014, a raid was conducted by the police at the respondent's house. Body search was conducted on the respondent and the raiding officer found a plastic packet which contained compressed dried leaves which later confirmed by the chemist to be 6.67g of cannabis. The respondent then took a plastic container which contained three lumps of compressed dried leaves from a wooden shelf in one of the room in the house and gave it to the raiding officer. The raiding officer conducted further search of the wooden shelf and found one glass jar which contained two lumps of compressed dried leaves; and one plastic container which contained compressed dried leaves. The compressed dried leaves were later confirmed by the chemist to be 534.12g of cannabis. Subsequently, the respondent was charged for two offences under s 6 of the Act, firstly for the possession of 534.12g of cannabis which was found in his house; and secondly for the possession of 6.67g of cannabis which was found on his body. The respondent pleaded guilty to both of the charges and was sentenced to eight years' imprisonment from the date of arrest and ten strokes whipping for the first charge; and 12 months' imprisonment from the date of arrest for the second charge. Both sentences were ordered to run concurrently. Dissatisfied with the sentence imposed on the first charge, the appellant filed this appeal. The appellant contended that the sentence passed did not commensurate with the crime committed and was manifestly inadequate. Further, it was contended that public interest was not given proper consideration. The appellant also contended that the guilty plea did not warrant any lesser punishment as the offence committed was a serious offence. It was also contended that based on the trend of sentencing, the appropriate sentence should be 15 years' imprisonment or more plus whipping. In reply,

the respondent contended that the guilty plea was a strong mitigating factor. In this case, the respondent had cooperated with the police; and had also a young family and ill parents to look after. The respondent also submitted that the sentence was appropriate and in the public interest.

Held, allowing the appeal:

(1) For offences punishable under s 39A(2) of the DDA which carries a minimum term of five years' imprisonment and maximum term of life imprisonment, the starting point for any offence committed without any aggravating or mitigating features in a contested case should be imprisonment for a term of 15 years and whipping (see para 12).

(2) The only mitigating factors that operate in favour of the accused were that he was a first offender and that he had pleaded guilty. He was not a young offender as he was 32 years old at the time the offence was committed. Hardship caused to the family as a result of imprisonment could not be accepted as a mitigating factor unless there were exceptional circumstances. In the instant case, no exceptional circumstances existed or had been shown to the court (see para 14).

(3) In the instant case, the court was unable to accede to the appellant's submission that no discount be given on account of the guilty plea. The court noted that the drugs in question for the first charge under s 39A(2) of the DDA were not found on the respondent but in a particular room in his house. The prosecution had a more onerous task in proving custody or control of the drugs in question if the respondent had insisted on a trial (see para 18).

(4) There were also strong aggravating factors against the respondent. The court noted that the amount of drugs involved was fairly large. It was ten times more than the threshold of 50g which would activate the punishment as prescribed under s 39A(2) of the DDA. Based on the mitigating and aggravating factors; and harkening to the established guidelines in sentencing, the court was of the view that the sentence of eight years' imprisonment imposed by the learned judge was manifestly inadequate and disproportionate to the offence committed. As such, the court substituted the sentence of imprisonment of eight years to imprisonment for a period of 12 years on the first charge (see paras 21–22).

[Bahasa Malaysia summary

Rayuan ini adalah terhadap hukuman yang tidak mencukupi yang dijatuhkan oleh Mahkamah Tinggi ke atas responden bagi tuduhan alternatif di bawah s 6 Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum di bawah s 39A(2) yang sama. Pada 27 Februari 2014, serbuan telah dijalankan oleh polis di rumah responden. Carian badan dijalankan ke atas responden dan pegawai

serbuan memperolehi paket plastik yang mengandungi daun kering yang dimampat yang kemudiannya disahkan oleh ahli kimia sebagai kanabis seberat 6.67g. Responden kemudiannya mengambil bekas plastik yang mengandungi tiga ketulan daun kering yang dimampat daripada rak kayu di dalam salah satu bilik di dalam rumah dan memberinya kepada pegawai serbuan. Pegawai serbuan menjalankan carian selanjutnya di rak kayu dan mendapati satu balang gelas yang mengandungi dua ketul daun kering yang dimampat; dan satu bekas plastik yang mengandungi daun kering yang dimampat. Daun kering yang dimampat tersebut kemudiannya disahkan kanabis seberat 534.12g. Responden kemudiannya, dituduh bagi dua kesalahan di bawah s 6 ADB, pertamanya untuk milikan kanabis seberat 534.12g yang diperolehi dalam rumahnya; dan kedua bagi milikan kanabis seberat 6.67g yang dijumpai di badannya. Responden memplid bersalah kepada kedua-dua tuduhan dan dihukum penjara lapan tahun dari tarikh tangkapan dan sepuluh sebatan bagi tuduhan pertama; dan penjara 12 bulan dari tarikh tangkapan bagi tuduhan kedua. Kedua-dua hukuman diperintahkan dijalankan serentak. Tidak berpuas hati dengan hukuman yang dikenakan atas tuduhan pertama, perayu memfailkan rayuan ini. Perayu berhujah bahawa hukuman yang dijatuhkan tidak sepadan dengan jenayah yang dilakukan dan jelas tidak memadai. Selanjutnya, ia dihujahkan bahawa kepentingan awam tidak diberikan pertimbangan betul. Perayu juga berhujah bahawa penakuan bersalah tidak mewajarkan apa-apa hukuman yang lebih rendah kerana kesalahan yang dilakukan adalah kesalahan serius. Ia juga dihujahkan bahawa berdasarkan tren hukuman, hukuman wajar sepatutnya adalah penjara 15 tahun atau lebih bersama sebatan. Dalam jawapan, responden berhujah bahawa pengakuan bersalah adalah faktor kukuh pengurangan. Dalam kes ini, responden telah bekerjasama dengan polis; dan juga mempunyai keluarga muda dan ibubapa yang sakit untuk dijaga. Responden juga berhujah bahawa hukuman adalah wajar dan dalam kepentingan awam.

Diputuskan, membenarkan rayuan:

(1) Bagi kesalahan yang boleh dihukum di bawah s 39A(2) ADB yang membawa kepada tempoh minima penjara lima tahun dan tempoh maksimum penjara seumur hidup, titik permulaan bagi apa-apa kesalahan yang dilakukan tanpa apa-apa ciri-ciri keterlaluan atau pengurangan dalam kes yang dipertandingkan sepatutnya penjara bagi tempoh 15 tahun dan sebatan (lihat perenggan 12).

(2) Satu-satunya faktor pengurangan yang beroperasi memihak tertuduh adalah bahawa di adalah pesalah pertama dan bahawa telah telah mengaku bersalah. Dia bukan pesalah muda kerana dia berumur 32 tahun pada masa kesalahan dilakukan. Keluarga akan mengalami kesusahan akibat pemenjaraan tersebut tidak boleh diterima sebagai faktor pengurangan kecuali terdapat keadaan luar biasa. Dalam kes ini,

tiada keadaan luar biasa wujud atau telah ditunjukkan kepada mahkamah (lihat perenggan 14).

(3) Dalam kes ini, mahkamah tidak dapat menerima penghujahan perayu bahawa tiada diskaun diberikan atas pengakuan bersalah. Mahkamah mempertimbangkan bahawa dadah yang dipersoalkan bagi tuduhan pertama di bawah s 39A(2) ADB tidak didapati di badan responden tetapi dalam bilik tertentu dalam rumahnya. Pihak pendakwaan mempunyai tugas yang lebih membebankan dalam membuktikan jagaan atau kawalan terhadap dadah yang dipersoalkan jika responden mendesak untuk perbicaraan (lihat perenggan 18).

(4) Juga terdapat faktor-faktor keterlaluan yang kuat terhadap reaponden. Mahkamah mempertimbangkan bahawa jumlah dadah yang terlibat adalah besar. Ia adalah sepuluh kali lebih daripada ambang 50g yang boleh mengaktifkan hukuman seperti yang ditetapkan di bawah s 39A(2) ADB. Berdasarkan atas faktor-faktor pengurangan dan keterlaluan; dan mengambil kira garis panduan yang ditetapkan dalam hukuman, mahkamah berpendapat bahawa hukuman penjara lapan tahun yang dikenakan oleh hakim perbicaraan adalah jelas tidak mencukupi dan tidak seimbang kepada kesalahan yang dilakukan. Dengan itu, mahkamah menggantikan hukuman penjara lapan tahun kepada penjara bagi tempoh 12 tahun ke atas tuduhan pertama (lihat perenggan 21–22).]

Notes

For cases on drug possession, see 5(3) *Mallal's Digest* (5th Ed, 2015) paras 4444–4449.

Cases referred to

Christopher Khoo Ewe Cheng v PP [1998] 3 MLJ 881, CA (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
PP v Leo Say & Ors [1985] 2 CLJ 155, HC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Low Kok Wai [1988] 3 MLJ 123, HC (refd)
PP v Mohd Fazelan bin Md Khuzeh [2015] 6 MLJ 688, CA (refd)
R v Boyd [1980] 2 Cr App Rep (S) 234, CA (refd)
Sau Soo Kim v PP [1975] 2 MLJ 134, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 6, 39A(2), 39B(1)(a)

Appeal from: Criminal Trial No 45A-80–09 of 2014 (High Court, Shah Alam)

Jasmee Hameeza bin Jaafar (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Amirul Ridzuan Hanif (Hanif & Co) for the respondent.

Harmindar Singh JCA:

[1] This is an appeal by the public prosecutor against the inadequacy of sentence passed by the High Court at Shah Alam on the respondent. The respondent was initially charged with an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). Subsequently, the prosecution tendered an alternative charge under s 6 punishable under s 39A(2) of the same Act for possession of 534.12g of cannabis in front of house No 16B, Jalan Pandan Indah 4/30, Pandan Indah, Kuala Lumpur ('the alternative charge'). The respondent also faced another charge of possession of 6.67g cannabis at the same place, an offence under s 6 of the Act.

[2] The respondent pleaded guilty to both the alternative charge and the charge under s 6 of the Act. For the alternative charge, the respondent was sentenced to eight years' imprisonment from the date of arrest and ten strokes of whipping. For the other charge, the respondent was sentenced to 12 months' imprisonment from date of arrest. Both sentences were ordered to run concurrently.

[3] The public prosecutor, being dissatisfied with the sentence imposed on the alternative charge, filed this appeal. After hearing submissions, we allowed the appeal. We set aside the sentence of eight years' imprisonment on the alternative charge and substituted it with imprisonment of 12 years effective from date of arrest. We affirmed the sentence of ten strokes of whipping. Our reasons for doing so now follow.

BACKGROUND FACTS

[4] The facts of the case as admitted by the respondent ('exh P6') can be summarised as follows. On 27 February 2014, at about 3.30pm, a raid was conducted by the police headed by Insp Mohamad Rashidi bin Mat Din, the raiding officer and complainant in this case. They raided the premise as stated in the charge. When the complainant arrived at the said house, he saw the respondent with a female child. The complainant introduced himself and arrested the respondent.

[5] Upon physical examination of the respondent, the complainant found one plastic packet which contained compressed dried leaves in the trousers pocket of the respondent. This was later confirmed by the chemist to be 6.67g of cannabis.

[6] The complainant then searched the respondent's house and what transpired next is as described in the admitted facts:

> OKT kemudiannya telah memandu arah Pengadu ke bahagian tingkat atas rumah dan masuk ke dalam bilik ketiga bahagian belakang. Setelah masuk ke dalam bilik tersebut, OKT telah mengambil 1 bekas plastik bertutup dari rak almari kayu bertingkat dan terus menyerahkannya kepada Pengadu. Hasil pemeriksaan Pengadu dapati di dalamnya mengandungi serbuk dan 3 ketulan mampat tumbuhan kering. Pemeriksaan selanjutnya terhadap rak almari kayu tersebut telah menjumpai 1 bekas balang kaca bertutup 'ASCON INTERNATIONAL' di dalamnya mengandungi 2 paket plastik lutsinar, masing-masing berisi ketulan mampat tumbuhan kering, Pengadu turut menjumpai 1 bekas plastik bertutup 'BABY WIPES' di dalamnya mengandungi 1 ketulan mampat tumbuhan kering dibalut dengan plastik lutsinar. Selain daripada barang-barang kes yang disyaki dadah di atas ditemui, Pengadu turut menjumpai 1 helai dokumen dari CIMB Islamic Bank dan 3 helai penyata akaun CIMB Islamic atas nama OKT di bahagian atas rak almari kayu berkenaan. Manakala, di atas lantai bilik yang sama, Pengadu telah menjumpai 1 beg plastik warna biru yang berisi beberapa paket plastik kosong, 1 papan pelapik kayu dan 1 bilah pisau.

[7] The items suspected to be dangerous drugs were sent to the chemist for analysis. Upon analysis, the chemist found the said items to contain 534.12g of the dangerous drug cannabis. It was admitted by the respondent that the room in which the drugs were found was used by him to store his things.

[8] The punishment provided under s 39A(2) of the Act is imprisonment for life or for a term which shall not be less than five years, and with whipping of not less than ten strokes. In the instant case, the learned judge imposed a sentence of eight years' imprisonment and ten strokes of whipping. Unfortunately, no grounds of decision were provided by the learned judge of the High Court. To be fair to the prosecution and the respondent, we will assume that the judge had taken into account all the matters raised before sentence was passed.

[9] The learned deputy public prosecutor ('DPP') contended that the sentence passed did not commensurate with the crime committed and was manifestly inadequate. It was further contended that public interest, being paramount, was not given proper consideration. The learned DPP also contended that the guilty plea did not warrant any lesser punishment as the offence committed was a serious one. The learned DPP submitted that taking into account the trend of sentencing, the appropriate sentence should be 15 years' imprisonment or more plus whipping.

[10] Learned counsel for the respondent however contended that the guilty plea was a strong mitigating factor. The respondent had also cooperated with

the police. The respondent also had a young family and ill parents to look after. Learned counsel submitted that the sentence was appropriate and in the public interest.

OUR DECISION

[11] It is axiomatic that in passing sentence, the court must take into account the mitigating and aggravating factors in order to ensure that the sentence passed is in accordance with law.

[12] We take the view that for offences punishable under s 39A(2) of the Act which carries a minimum term of five years' imprisonment and maximum term of life imprisonment, the starting point for any offence committed without any aggravating or mitigating features in a contested case should be imprisonment for a term of 15 years and whipping.

[13] In drug cases, the mitigating factors that can usually be taken into account are a guilty plea, being a first offender or a young offender. The aggravating factors usually involve a consideration of the gravity of the offence, the type of drugs involved and the weight of the drugs. These considerations are by no means exhaustive as mitigating or aggravating factors. The paramount consideration in the end is public interest which may vary according to the circumstances of each case.

[14] In the instant case, the only mitigating factors that operate in favour of the accused are that he is a first offender and that he had pleaded guilty. He is not a young offender as he was 32 years old at the time the offence was committed. Hardship caused to the family as a result of imprisonment cannot be accepted as a mitigating factor unless there are exceptional circumstances. Such hardship is the price one has to pay and is a consequence that follows any incarceration. Such a consequence ought to have been considered by an accused person before contemplating the commission of a crime. In the instant case, no exceptional circumstances exist or have been shown to the court.

[15] With regard to the plea of guilt, we agree that in exceptional cases a guilty plea may not result in a lesser sentence, for example in a case where a serious offence is committed (*Public Prosecutor v Leo Say & Ors* [1985] 2 CLJ 155) or where there is effectively no defence to the charge (*Public Prosecutor v Low Kok Wai* [1988] 3 MLJ 123).

[16] Nevertheless, it is an accepted policy of the courts that a plea of guilty should in most cases be treated as a mitigating factor. The reasons for this are obvious. A guilty plea avoids the expense and inconvenience of a trial. A discount for a guilty plea serves as a strong incentive and encourages such pleas.

A On the other hand, if there is no such incentive, accused persons may then all insist on a trial as they have nothing to lose since the sentence will be the same (*Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167; and *R v Boyd* (1980) 2 Cr App Rep (S) 234 (CA)).

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[17] There is no fixed rule as to the discount but it should be between one-quarter and one-third of not the maximum sentence imposed by the statute but on what would have been the sentence if the accused had claimed trial and found guilty (*Mohamed Abdullah Ang Swee Kang v Public Prosecutor* and *Christopher Khoo Ewe Cheng v Public Prosecutor* [1998] 3 MLJ 881).

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[18] In the instant case, we are unable to accede to the learned DPP's submission that no discount be given on account of the guilty plea. We note that the drugs in question for the alternative charge under s 39A(2) of the Act were not found on the respondent but in a particular room in his house. The prosecution here would have had a more onerous task in proving custody or control of the drugs in question if the respondent had insisted on a trial.

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E **[19]** As against this are the strong aggravating factors that operate against the respondent. Way back in 1976, Hashim Yeop Sani J (as His Lordship then was) had occasion to comment on the amendments to increase the penalties for drug cases in *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256 at p 257:

> F It is common sense to say that behind these legislative exercises was the government's realisation albeit gradual, of the problem of drug abuse in this country, the degenerating effect of the misuse of dangerous drugs and the attendant dangers it has posed to society itself. The amendments passed by Parliament therefore reflect the public policy. It must be presumed that behind the public policy is the consideration of public interest.
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> G The change in the attitude of the legislature itself during the last three years reflects the seriousness of the problem. In my view the courts will not be performing their functions honestly if the seriousness of the situation is not reflected in the sentence imposed if the sentence appears to defeat the object of the statute. This is not saying that the courts in the treatment of drug offences should at all times be severe. Each case has to be determined on its own merits. But in every case the courts must be H realistic and rational.

[20] Fast forward to the present time, the seriousness of the drug menace has not abated but has in fact become worse if the number of cases before the courts are any indication. In a recent decision of this court, *Public Prosecutor v Mohd Fazelan bin Md Khuzeh* [2015] 6 MLJ 688, Aziah Ali JCA (as Her Ladyship then was) in speaking for the court observed:

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> We were of the view that offences involving dangerous drugs ought not to be treated lightly so as not to trivialise the gravity of such offences. Public interest is a

paramount consideration. The fact that the respondent is a first offender or that he had pleaded guilty ought to be weighed against the facts of the case, the circumstances in the commission of the offence, the type of drugs involved and the weight of the drugs.

[21] As an aggravating factor as well, we also noted that the amount of drugs involved was fairly large. It was ten times more than the threshold of 50g which would activate the punishment as prescribed under s 39A(2) of the Act.

[22] Taking into account the mitigating and aggravating factors that exist in the present case, and harkening to the established guidelines in sentencing as alluded to earlier, we are of the view that the sentence of eight years' imprisonment imposed by the learned judge is manifestly inadequate and disproportionate to the offence committed. As such, we are constrained to substitute the sentence of imprisonment of eight years to imprisonment for a period of 12 years on the alternative charge. The order of whipping of ten strokes is maintained. The order for the imprisonment sentences to run concurrently from the date of arrest of the respondent is affirmed. Order accordingly.

Appeal allowed.

Reported by Dzulqarnain Ab Fatar